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THE BRENDAN BROWN LECTURE*

ACCOUNTABILITY WITHOUT CAUSALITY: TORT LITIGATION REACHES FAIRY TALE LEVELS

Jude P. Dougherty**

Tort Litigation Reaches Fairy Tale Levels was the caption given to a letter to the editor recently published by the *Wall Street Journal*. The writer, of course, was not the first to notice.¹ By one estimate, tort awards are 2.3 percent of the United States gross national product, about eight times the comparable rate of Japan.² Another study reports that liability insurance rates in the United States are twenty times those of Europe.³ Complaints about the drift that tort law has taken have come from many quarters, as sellers are found strictly liable for cleanups,⁴ as courts have allowed industry liability for "unsafe" products,⁵ and as physicians have been obligated to pay

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An invitation to give the Brendan Brown lecture confers both a great sense of intellectual responsibility and a heady amount of freedom. No restrictions are placed on the subject, so long as it somehow concerns the realm of law. I am grateful to Professor George Smith for his invitation to address, as a philosopher, a number of issues confronting both the philosophical and the legal worlds. I cannot presume to tell the student of law anything about the law, but I can speak about philosophical attitudes which affect our understanding of law. Theory precedes legislation, whether it be enacted by assemblies or judicial fiat.

1. The 78th American Assembly, May 31 to June 3, 1990, was devoted to Tort Law and the Public Interest. Seventy men and women representing a spectrum of leaders from the defense and plaintiff's bar, industry, insurance, medicine, science, government, the judiciary and academia met to assess the drift of tort law in America.

2. *The MacNeil/Lehrer News Hour* (PBS television broadcast, Feb. 10, 1992) (statement of Ted Olson, Citizens for Civil Justice Reform).

3. William Fay, *Invisible 'Lawyers Tax'*, WASH. TIMES, July 24, 1991, at G3.

4. While usually a matter of federal and state regulations, rather than tort law, liability for environmental infractions proceeds from the same expanded duty of care that drives current tort concepts.

5. See James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived its Origins*, 37 VAND. L. REV. 1117, 1140-43 (1984); David G. Owen, *Problems in*

enormous sums for insurance protection against malpractice awards.⁶ Questionable court rulings are occurring with enough frequency that it is apparent to anyone who follows American legal practice, even in a cursory way, that major shifts in legal theory are occurring.⁷ Tort law is, of course, but one facet of a vast legal system, a system built upon an ancient philosophy of law and notions concerning the function of law in society.

I.

It is not simply, as one would expect, that a difference exists between the nineteenth and twentieth century jurisprudential outlooks. G. Edward White, in his 1980 book, *Tort Law in America*, reports a major shift in discussions of tort law between the 1950's and the 1970's.⁸ He finds that typical law review articles in the fifties were tightly argued analyses of case law leading to the discovery of an applicable principle, whereas in the seventies tort literature was supplanted by broad and abstract analyses based on sociological and economic perspectives.⁹ "The novel quality of recent casebooks," says White, "is their tendency to speculate broadly on the functions of tort law as a whole"¹⁰ He cites one textbook that calls for a "critical examination of fundamental ideas underlying tort liability"¹¹ and another that discusses "three competing perspectives" concerning its rationale.¹² The 1970's literature, which White views with some alarm because of its "nonlegal, theoretical perspective,"¹³ has been amplified as philosophers and social theorists have added works bearing titles such as: *A Sociological Theory of Law*,¹⁴ *Marxism and Morality*,¹⁵ *Ethics and the Rule*

Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. CHI. L. REV. 1, 24-28 (1982).

6. See generally Lee Smith, *A Cure for What Ails Medical Care*, FORTUNE, July 1, 1991, at 44, 46; Martin Tolchin, *Concern Over the Costs of Malpractice Liability*, N.Y. TIMES, Nov. 5, 1989, at 4.

7. See, e.g., *Ford Motor Co. v. Durrill*, 714 S.W.2d 329 (Tex. Ct. App. 1986) (awarding \$10 million punitive damages); *Palmer v. A.H. Robbins Co.*, 684 P.2d 187 (Colo. 1984) (awarding \$6.2 million punitive damages).

8. G. EDWARD WHITE, *TORT LAW IN AMERICA* 212-15 (1980).

9. *Id.* at 212 (characterizing discussion of tort law in the 1950's as being "narrow in its focus, modest in its goals, and saturated with the conventional patterns of approved professional reasoning of the time").

10. *Id.* at 215.

11. *Id.* (quoting PAGE KEETON & ROBERT KEETON, *CASES AND MATERIALS ON THE LAW OF TORTS* xvi (1977)).

12. *Id.* at 215-16 (citing CHARLES GREGORY ET AL., *CASES AND MATERIALS ON TORTS* at xxii (1977)).

13. *Id.* at 217.

14. NIKLAS LUHMANN, *A SOCIOLOGICAL THEORY OF LAW* (1985).

15. STEVEN LUKES, *MARXISM AND MORALITY* (1985).

of Law,¹⁶ *The End of Law*,¹⁷ *Marxism and Law*,¹⁸ *The Concept of Socialist Law*,¹⁹ *Collective and Corporate Responsibility*,²⁰ and *Post Modern Jurisprudence*.²¹ White suggests that shifting legal perspectives may be the result of the law groping for a secular foundation to replace its former theistic underpinnings.²²

Lord Patrick Delvin, writing in the early 1960's, speculated that if a society's laws are based on a particular world view and that world view then collapses, the laws themselves will crumble.²³ Ronald Dworkin, in his work, *Law's Empire*,²⁴ argues the converse thesis: In a moral pluralistic society, only law can provide the unity required for social order. For Dworkin, law receives its moral force precisely because it provides this unifying function. Recognizing that Western society is ideologically split, Dworkin says that law no longer flows from a common view of man and the social order. Instead, law tends to be created as a tissue of compromise between self-interested parties, and consequently provides the only set of agreed-upon principles which may serve as norms for concerted action. Alasdair McIntyre reminds us, in *Whose Justice? Which Rationality?*²⁵ and again in *Three Rival Versions of Moral Inquiry*,²⁶ that rival intellectual traditions are not only incompatible but also give rise to different legal structures. The conditions of the administration of Aristotelian justice, he maintains, are different from the conditions of the administration of justice based on the principles of David Hume.

It may be noted that the ideological split is not one of cultural pluralism. It is not that we are confronted with a variety of cultures—for example, Islamic, Oriental and Western—vying for allegiance. Rather, the conflict is between two modes of Western thought, reducible, roughly, to the Roman and common law tradition on the one hand, and its repudiation on the other. At one level, the conflict is between two differing conceptions of law and differing conceptions of the role of law in society. At a deeper level, the conflict is between two views of human nature. The nineteenth century materialism and social and psychological determinisms advance one view; the

16. DAVID LYONS, *ETHICS AND THE RULE OF LAW* (1984).

17. TIMOTHY O'HAGAN, *THE END OF LAW* (1984).

18. HUGH COLLINS, *MARXISM AND LAW* (1982).

19. CHRISTINE SYNOWICH, *THE CONCEPT OF SOCIALIST LAW* (1990).

20. PETER A. FRENCH, *COLLECTIVE AND CORPORATE RESPONSIBILITY* (1984).

21. COSTAS DOUZINAS, *POST MODERN JURISPRUDENCE* (1991).

22. WHITE, *supra* note 8, at 214.

23. PATRICK B. DELVIN, *THE ENFORCEMENT OF MORALS* (1965).

24. RONALD M. DWORKIN, *LAW'S EMPIRE* (1986).

25. ALASDAIR C. MCINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* (1988).

26. ALASDAIR C. MCINTYRE, *THREE RIVAL VERSIONS OF MORAL INQUIRY* (1990).

virtue ethics and the common good morality of the natural law tradition advance another.

Theories respecting the purpose of law date to antiquity; clear expressions are to be found in the pre-Socratics and in Plato.²⁷ In the *Laws*,²⁸ Plato identified the purpose of law as instruction both of the individual and of society. The legislator's method, Plato observed, is not essentially different from that of a physician, for law is nothing other than a prescription for a well-ordered society. Law is both a communication and an institutionalized means to regulate and direct human behavior. Communal interests demand that codes of behavior be formulated and observed. A well-ordered society is likely to be a beneficent one.

A beneficent social order is undoubtedly the goal of those who aim to change our way of thinking about the objectives of law. It was the goal of Karl Marx when he delivered his famous critique of bourgeois law.²⁹ Marx was convinced that the bourgeois law of his day was the product of a capitalist ruling class, a class which created the law to sustain its mode of economic organization. Marx's critique focused on nineteenth century tort law, which he thought tempered entrepreneurial risk with a doctrine that places the risk of accidents and product defects on the user. His blueprint for the establishment of a socialist order necessitated the overthrow of the status quo in favor of laws that would promote his egalitarian conception of society. Marx recognized that before the revolution could occur, the groundwork had to be laid. First, the belief structures that prevail have to be shown to be historically contingent. This he found to be easy, for they can be shown not always to have existed in their present form. Once contingency is recognized, the door is open to change; legal structures, just and unjust, are thus seen to be alterable. It may take courage and cunning to organize, with others, the struggle against the received, but once the ideological structure is in place, the practical structure may be advanced. Although the failure of Marxism as an economic theory has been clearly observed in the economic collapse of Eastern Europe and the Soviet Union, its inadequacy remains to be demonstrated in other areas.

27. See generally CARL J. FRIEDRICH, *THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE* (2d ed. 1963) (providing a good discussion of these theories).

28. PLATO, *LAWS* (A.E. Taylor trans., 1934), reprinted in *THE COLLECTED DIALOGUES OF PLATO* 1225-513 (Edith Hamilton & Huntington Cairns eds., 1961).

29. KARL MARX & FREDERICK ENGELS, *THE COMMUNIST MANIFESTO* (International Publishers Co. 1990) (1847).

One of the most notorious expressions of Marxist legal theory is found in the theory currently recognized under the banner of Critical Legal Studies,³⁰ though it has antecedents in the outlook known variously as Legal Realism, Legal Positivism and Legal Activism.³¹ I do not wish to exaggerate the influence of the Critical Legal Studies movement on the courts. The judicial system on the whole works well as the courts invoke solid case law in the everyday satisfaction of their mandate. Yet, there seems to be a subtle battle for the soul or conscience of the nation taking place within the American academy as the Critical Legal Studies faction forms one battle group at war with the Western culture. Like Marx, the "Crits" recognize that law enforces, reflects, constitutes and legitimizes commonly perceived notions of right and wrong, and of excellence and decay. In the promotion of their own ends, they seek command posts in the courts and in the law schools and, when it becomes possible, they do not hesitate to instantiate law which reflects their social objectives. In their hands, the law has become a political instrument.

No one can deny the discretionary nature of court decisions, but to flatly deny that objectivity and justice are desiderata, as many do, is to fly in the face of the traditional notion of the role of law in society. It is bad enough that the Critical Legal Studies faction tends to reduce the framing of law to a political function, but the political objectives in question are usually not those chosen in any democratic referendum. Objectives sought are framed by an intellectual elite, often contrary to the judgment of the common man. Activist judges, drawing upon purely academic intelligence, find confirming legal rationalizations for their choices, ignore or distort contrary arguments, authorities, facts and social realities, and in so doing transform the inherited culture which serves daily life. The battleground extends over areas such as class, race, sex, the Constitution, crime, personal injury and business.

The judgment that the Critical Legal Studies movement is only a thinly disguised socialist program is supported by a profile of the kinds of persons who compose its ranks:

Some of us [were] law teachers with humanist intellectual concerns and liberal (civil rights and antiwar) political involvements in the 1960s and 1970s; others radical activists of the 1960s who identified with neo-Marxist versions of socialist theory or feminism or

30. Robert A. Black et al., Essay, *Critical Legal Studies, Economic Realism, and the Theory of the Firm*, 43 U. MIAMI L. REV. 343, 357-58 (1988).

31. See generally *Humanistic Economics: A New Model for the Corporate Constituency Debate*, 59 U. CIN. L. REV. 321 (1990); Andrew Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 PHIL. & PUB. AFF. 205 (1986); David M. Trubek, *Back to the Future: The Short, Happy Life of the Law and Society Movement*, 18 FLA. ST. U. L. REV. 4 (1990).

both; still others primarily practitioners, many of whom are associated with the National Lawyers Guild and who work in collective law practices, legal services offices, or a variety of other progressive jobs.³²

The aim of the movement, according to Robert Gordon, is to challenge the underlying rules, principles and purposes that gave the inherited law its character.

It is clear here that belief systems are in conflict. Many of the social aims endorsed by the moderate faction of Critical Legal Studies Realists are shared by others, but the categories invoked in their defense by the others are usually those of classical and biblical wisdom, which stand in contrast to the categories most cited by the Critical Realists, categories provided by Marx, Sartre, Foucault, Lukacs, Derrida, Habermas and Levi-Strauss. If it is true that alternative views of human nature are at the root of this conflict, it may be useful to examine some of those thought patterns. A theoretical aim of law, which the "Crits" regard as compatible with ancient conceptions, is the correction of social imbalance and the righting of natural inequity. Thus, law is used to remove inequalities, to redistribute income and to remove, as far as possible, the ill-effects of natural handicaps. The question that needs to be discussed is whether this should be an aim of law, particularly of judge-made law.

No one, not even those critical of the activist movement, will argue that social objectives cannot be established by law, or that law must comport with viewpoints shared by all. Yet, goals can be inappropriate for a multiplicity of reasons. For one, legislative or court instituted objectives may not have been well thought out. For another, many worthy ends may not be attainable in practice, given the propensities of human nature. For example, in welfare legislation, it may be that apart from the temporary alleviation of misfortune, beneficiaries are not helped by government largesse. Furthermore, laws that redistribute income may be a disincentive when it comes to the creation of wealth. There is evidence, in fact, that laws created in the interest of the poor, which bring into being massive bureaucracies, ultimately work to the detriment of those whom they seek to assist. Laws, for example, that enforce rent control undoubtedly have the effect of reducing the housing supply. As a matter of historical record, the activism of courts striking down or diminishing residency requirements for welfare benefits³³ changed the character of many of our major cities.

32. Robert W. Gordon, *New Developments in Legal Theory*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 282 (David Kairys ed., 1982).

33. *E.g.*, *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969) (disallowing residency requirements for welfare benefits as violative of equal protection).

If there are questionable social effects of even well-intentioned lawmaking that passes through the legislative process, the subversive effect on the common good of special interest lawmaking through the channel of the courts is obvious. So-called "interest groups" with legislative agendas take it for granted that they are more likely to have their aims implemented through the process of judicial review than through the enactments of legislative assemblies. Litigation is instigated with deliberation; where permitted, forum shopping is standard practice as activist organizations seek judges of like-mind or favorable state law.

Activism alone, however, cannot account for success. Before a judicial outlook can be changed, as Marx rightly noted, the intellectual soil first must be made receptive. As Marx was well aware, it is manifestly easier to change the minds of those associated with the interpreting of law than it is to change the minds of those responsible for legislative enactments. Unfortunately, the split between the intellectuals and the people on basic social issues is great. Thus, to use one example, a handful of social scientists, by carefully placing in a variety of law journals more or less the same article, with statistics changed to fit the locale, purporting to show the uselessness of capital punishment as a deterrent, managed through sympathetic courts to have the United States Supreme Court void most state capital punishment laws.³⁴ It is doubtful that any public referendum would have voided most state laws regarding capital punishment. Similar examples abound.

One cannot avoid the view that in the English speaking world we have witnessed, in the decades since the sixties, a concerted effort to change social structures by changing the law. The new law is the product of a "new" way of looking at things. I say "new" guardedly, since the new is little more than an Enlightenment way of looking at things. McIntyre uses the symbols of Aristotle and David Hume to designate the difference between the old and the new.

Although such issues are rarely accorded public debate, they are occasionally aired in the United States Supreme Court and the Senate Judiciary Committee. In briefs submitted to the Court and in hearings before the Senate Judiciary Committee, ideas that touch upon the fundamental aspirations of life and that affect the culture of the nation and its modes of governance are contested. While a generation ago the activist bent of many courts may have gone unnoticed, today no one denies that judge-made law has become a powerful force in shaping the nation's culture, perhaps more so than the enactments of legislative assemblies, either at the national or state level. The

34. *Furman v. Georgia*, 408 U.S. 238 (1972) (invalidating the death penalty laws of 39 states, the District of Columbia, and those federal provisions that permit the death penalty).

bench itself tends to reflect the intellectual trends of the very same academy that inspires the interest groups to action. Whereas any legislation is apt to be the result of mutual concession, judge-made law often reflects the purely utopian ideas of the academy. Social theory fabricated by intellectuals who are untouched by life in the work-a-day world is compelling in its clarity and with ease can be translated into law by an activist judiciary. To understand the drift of contemporary courts, one has to probe beneath current legal theory and place such theory in a larger cultural, philosophical context. Philosophers have not been hesitant to advance their own objectives through discussions of law and the social objective of law. If one looks, one may be surprised at the number of articles by philosophers which appear in legal journals.

Law, whether created by legislative or judicial action, is but one strand in the fabric of an intellectual tradition. Peter W. Huber, in discussing changing conceptions of "liability," recognizes as much when he identifies a concerted effort on the part of a handful of legal scholars, largely for philosophical reasons, "to repeal the common law of torts."³⁵ Ted Honderich convincingly shows the legal implications of accepted theories of psychological determinism and their tendency to instantiate liberal rather than conservative policies in the social order.³⁶ Peter A. French and Larry May authored two other philosophical works of interest to legal theorists. French writes about collective and corporate responsibility, providing a systematic rationale for holding corporations not merely civilly but also criminally accountable.³⁷ Larry May argues that many social groups which lack tight organizational structure are arguably collectively responsible for the joint actions of their members, and similarly that social groups are capable of being harmed even when individual members are not aware of the harm.³⁸ "In unorganized groups," writes May, "solidarity and other relationships allow the group to have action and interest, even though no decision-making structure for the group exists."³⁹ The last mentioned works are only two which challenge traditional notions of accountability. Liability follows causality, negligence presupposes a free act. These principles are challenged, not only by French and May, but by many others.

35. PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988).

36. TED HONDERICH, *A THEORY OF DETERMINISM: THE MIND, NEUROSCIENCE AND LIFE-HOPES* (1988).

37. PETER A. FRENCH, *COLLECTIVE AND CORPORATE RESPONSIBILITY* (1984).

38. LARRY MAY, *THE MORALITY OF GROUPS: COLLECTIVE RESPONSIBILITY, GROUP-BASED HARM, AND CORPORATE RIGHTS* (Thomas Donaldson ed., 1987).

39. *Id.* at 180.

The literature is not without its effect. United States corporations are increasingly the victims of the new modes of thought, as zealous prosecutors couple philosophically derived principles with vague federal statutes to transform civil regulations into criminal law.⁴⁰ Numerous state and local regulations similarly have been criminalized.⁴¹ In holding corporations accountable for regulatory violations, many prosecutors no longer require evidence of mal intent, the traditional condition of criminal conduct. Dubious or not, the notion of corporate criminal liability is one that hands over to an unreasonable prosecutor a powerful capacity for mischief. If a corporation can be exposed to criminal punishment for even a good faith error of judgment, traditional common law, in important respects, has been abandoned. In April of this year, the United States Sentencing Commission voted to send Congress draft guidelines for sentencing corporations and other organizations convicted of federal offenses.⁴² J.M. Kaplan reports that "[u]nder the guidelines, convicted corporations could face mandatory fines of staggering amounts — as high as \$290 million dollars in some circumstances, and even higher."⁴³

II.

With this Chagall-like impression as a backdrop, it is my intention to focus upon the notion of "causality" and other ideas crucial to tort litigation, such as "*mens rea*," "free agency" and "collective responsibility." Tort law is important because it affects not only the litigants, but the economic productivity of a region or a nation, consequences that the redistributionists who use it to achieve their own ends rarely take into account. Alarming too is the contemporary tendency to award punitive damages and to substitute criminal prosecution for civil actions in cases of tort.⁴⁴ Through criminal prosecution instead of civil action, the state is, in effect, extending its protective role to the work place, to the environment, and to the market.

Accountability without causality is a recurring concept in contemporary tort litigation. A few well publicized cases may serve to illustrate a number of key principles. One such case never reached the courts. Fear of adverse publicity and of a negative verdict led the Johnson and Johnson Company to

40. See Thomas L. Patten, *From Ethics Issues to Criminalization: Detering the Wrong Conduct*, 58 GEO. WASH. L. REV. 526 (1990).

41. *Id.*

42. Jeffrey M. Kaplan, *The Corporate Sentencing Guidelines: Making Compliance Programs "Effective,"* 1 CORP. CONDUCT Q. 1 (1991).

43. *Id.* at 1.

44. See *supra* notes 40-43 and accompanying text.

settle out of court a case involving poisoned Tylenol tablets.⁴⁵ Claiming that there was no way it could have anticipated a criminal tampering with its product, Johnson and Johnson nevertheless settled claims resulting from the deaths of seven Chicago area people. Lawyers for the plaintiffs contended that Tylenol's manufacturer, Johnson and Johnson's McNeil Consumer Products unit, should have known the capsules were vulnerable and thus had a duty to protect consumers. The criminal actually responsible for the deaths so far has gone undetected. In another illustrative case, a federal appeals court in Atlanta ruled that financial institutions can be held liable for toxic cleanup of tainted properties where they have taken over that property as a result of defaults on loans.⁴⁶

A third example of accountability without causality is a recent trend of courts to impose collective liability on manufacturers even though plaintiffs were unable to identify which company sold the defective product.⁴⁷ In some instances, corporate defendants have been assessed damages even after proving that they could not possibly have caused the harm.⁴⁸ Between 1940 and 1971, approximately two million women took the synthetic hormone diethylstilbestrol (DES) to prevent miscarriages and morning sickness during pregnancy.⁴⁹ The drug had been approved by the U.S. Food and Drug Administration and marketed by some 300 pharmaceutical companies, often under generic labels. In 1970, researchers reported cancer and other problems among the daughters of DES users, and the FDA banned the drug in 1971. The cases quickly went to court, but the mothers of many DES plaintiffs couldn't prove which brands they used. Courts in several states made the assumption that all DES pills were essentially the same and created a "market share test" that allowed damages to be assessed against the drug makers in proportion to their share of sales in the market.⁵⁰ In New York, the highest court went further, applying the market share concept of responsibility to a drug manufacturer that could prove that the defendant's mother did not use its pills.⁵¹

45. Lourdes L. Valeriano, *Johnson & Johnson Settles Suits Tied to Tylenol Deaths*, WALL ST. J., May 14, 1991, at B7.

46. *United States v. Fleet Factors Corp.*, 724 F. Supp. 955 (S.D. Ga. 1988), *aff'd*, 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 752 (1991).

47. *See, e.g., Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1075-78 (N.Y.), *cert. denied*, 493 U.S. 944 (1989); *Sindell v. Abbott Labs.*, 607 P.2d 924, 928-35 (Cal.), *cert. denied*, 449 U.S. 912 (1980).

48. *Hymowitz*, 539 N.E.2d at 1078-79.

49. *Sindell*, 607 P.2d at 927.

50. *See, e.g., id.* at 936-38.

51. *Hymowitz*, 539 N.E.2d at 1078-79.

In a similar case, a Cleveland jury in federal court awarded \$650,000 in punitive damages to the estate of a merchant seaman who died in 1988 at the age of sixty-one from mesothelioma, a form of lung cancer believed to be caused by asbestos.⁵² Until the 1970's, merchant ships were built using asbestos. The seaman had sailed between 1944 and 1969 with thirteen different companies, all thirteen of which were joined as defendants. Their common defense was that they did not know any more about the dangers of asbestos than anyone else.

A recent case goes one step further. An intermediate appeals court in the state of New York ruled that the several makers of multipiece tire rims, one of which had been implicated in a wrongful death, could be jointly sued, even though two of the three manufacturing companies which were charged could prove that their product was not involved.⁵³ The court ruled that the plaintiffs could introduce evidence that the companies acted in concert, through an express agreement or a tacit understanding, to prevent public awareness of the propensity of multipiece tire rims to explode and thereby prevent government action that would have banned their use.⁵⁴

Thus, the following questions are forced upon us. Can there be collective complicity, and therefore collective liability, without personal or corporate guilt? Can a corporation be held liable where there is no evidence that it or anyone else knew of any risks connected with its product or practice?

Broad notions entertained in the framing of law are almost always the by-product of previous philosophical discussion. Before the concept of "market share" became current, certain philosophical discussions of collective guilt, collective responsibility and punishment had to occur. Traditional notions of liability depended on the acceptance of the principles of causality and free agency. With the ascendancy of various psychological and sociological determinisms, those principles were challenged. There was a time when the law was fairly clear: One had in some way to be causally responsible to be held liable. The new theory would require compensation for any loss. If compensation is not available from the wrongdoer, then the burden of compensation is thought to be distributable to the community. Notions such as "responsibility," "causality" and "intention" are therefore diluted. Social objectives supersede legitimate accountability or fault. The ancient starting point of tort law, "the loss lies where it falls," is replaced by the idea that "the loss lies with the community."

52. Amy Stevens & Amy D. Marcus, *Law*, WALL ST. J., May 14, 1991, at B5, col. 1.

53. *Rostelli v. Goodyear Tire & Rubber Co.*, 565 N.Y.S.2d 889, 891 (App. Div. 1991).

54. Amy D. Marcus, *State Court Allows Industrywide Liability*, WALL ST. J., March 25, 1991, at B5.

The traditional concept of tort law was one of an instrument of corrective justice. Its intent was the restoration to the status quo that existed prior to any infringement of a person's rights. Aristotle called this "rectificatory" justice.⁵⁵ The plaintiff in a tort action, it was thought, should recover because of an unlawful interference with his right, not because of any more general public goal of the state.

Today, damages are routinely awarded to victims who previously would have been barred from recovery, such as charitable hospital patients, social guests, trespassers, and those who are contributorily negligent.⁵⁶ Employers or manufacturers engaged in abnormally dangerous activities are frequently defendants, even when the danger is antecedently apparent to all parties.⁵⁷ Rarely in 19th century law would one encounter damages for intangible injuries. Today, however, tort damages are awarded for physical pain, disfigurement of body, damage to emotional relationships and loss of consortium.⁵⁸

The transformation of tort law has taken place over a period of time. Many torts, particularly the most serious, are caused by both public and private corporate entities. Collectives can cause much greater damage, whether through momentary events, such as the Bhopal disaster,⁵⁹ or through ongoing activities, such as the manufacturing and sale of asbestos as insulating material,⁶⁰ the marketing of thalidomide,⁶¹ or the dumping of toxic waste.⁶² Holding corporations civilly accountable for wrongdoing, even when the fault is traceable to a maverick employee, is in accord with traditional notions of accountability. Corporations are not mere aggregates of people but have a metaphysical-logical identity. Otto Gierke correctly

55. ARISTOTLE, NICOMACEAN ETHICS (W.D. Ross trans.) in 2 THE COMPLETE WORKS OF ARISTOTLE 1786-87 (Jonathan Barnes ed., 1984).

56. Richard L. Abel, *A Critique of Torts*, 37 UCLA L. REV. 785, 788 (1990).

57. *Id.*

58. *Id.* at 789; see also 1 MARILYN MINZER ET AL., DAMAGES IN TORT ACTIONS, §§ 1.11, 3.12[2][c] (1991).

59. There were approximately four thousand deaths and 30-60 thousand serious injuries following the Bhopal, India, disaster. See Abel, *supra* note 56, at 786; Jack B. Weinstein & Eileen B. Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U. ILL. L. REV. 269, 270.

60. It has been estimated that more than 21 million workers have been exposed to asbestos. Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 FORDHAM L. REVIEW 37, 37 n.1 (1983).

61. See Barry S. Roberts & David Z. Bodenheimer, *The Drug Amendments of 1962: The Anatomy of a Regulatory Failure*, 1982 ARIZ. ST. L.J. 581, 584 (stating that several thousand European babies were born with defects in the early 1960's as a result of maternal ingestion of thalidomide).

62. Myra P. Mulcahy, Note, *Proving Causation in Toxic Torts Litigation*, 11 HOFSTRA L. REV. 1299, 1299 (1983).

suggested that by conferring on the corporation the status of a legal person, the law is merely recognizing a pre-legal social condition.⁶³

Traditionally, when obliged to determine liability, a court would distinguish between proximate and remote causes.⁶⁴ It was recognized that an intervenient or supervenient cause might break the causal chain. Furthermore, 19th century judges tended to allow recovery only if defendants were morally culpable and victims wholly innocent.⁶⁵ So much confidence was placed in judicial procedure that in the heyday of ordinary language philosophy, H.L.A. Hart was prompted to study legal language and decisions of the court in order to gain some insight into the nature of causality.⁶⁶ That study became the influential book, *Causation in the Law*.⁶⁷ Hart found from his study of British common law and the judiciary system of the United States that courts inevitably claim they are employing the ordinary man's conception of causality in determining legal responsibility. The causality issue is, of course, not new. It was discussed in the 19th century in terms not unlike those found in some contemporary literature. The 19th century debate between Nicholas St. John Green and Francis Wharton is instructive, both for the issues confronted and Wharton's common sense resolution of them.⁶⁸ At that time, Green was a young instructor at Harvard Law School and a member of the famous Metaphysical Club of Cambridge, whose membership also included William James, Chauncey Wright, and Oliver Wendell Holmes. Green may have been the first to directly challenge the orthodox legal notion of objective causation.

In an *American Law Review* article of 1870, Green challenged both the notion of "objective causation" and the notion of "causal chain."⁶⁹ Echoing John Stuart Mill, Green wrote, "To every event there are certain antecedents It is not any one of this set of antecedents taken by itself which is the cause. No one by itself would produce the effect. The true cause is the whole set of antecedents taken together."⁷⁰ The legal implications are obvi-

63. OTTO GIERKE, *NATURAL LAW AND THE THEORY OF SOCIETY: 1500 TO 1800* § 18 (Ernest Barker trans., 1960).

64. Morton J. Horwitz, *The Doctrine of Objective Causation*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 201, 202 (David Kairys ed., 1982).

65. Catharine P. Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348, 2355 (1990).

66. H.L.A. HART & A.M. HONORÉ, *CAUSATION IN THE LAW* 1 (1959).

67. *Id.* First published in 1959, it was reprinted four times; the second edition appeared as recently as 1985.

68. See generally Horwitz, *supra* note 64.

69. Nicholas St. John Green, *Proximate and Remote Cause*, 4 AM. L. REV. 201 (1870), reprinted in NICHOLAS ST. JOHN GREEN, *ESSAYS AND NOTES ON THE LAW OF TORT AND CRIME* 1 (1933).

70. *Id.* at 211.

ous. If no distinction is made between occasion, condition, and cause, then the true mechanism responsible for the effect is impossible to determine. Turning his attention to the metaphor "causal chain," Green offered this political interpretation: "When a court says this damage is remote . . . all [it] mean[s] . . . is that under all the circumstances [it] think[s] the plaintiff *should* not recover."⁷¹ Green was convinced that the court manipulated the terms "proximate" and "remote" to accomplish its policy objectives in contract and negligence cases.⁷² Like Marx, he believed that law was simply an instrument of the ruling class whose values it instantiated.

Francis Wharton saw that Green's doctrine was incompatible with the principles of both the Roman and Anglo-American common law traditions. In 1874 Wharton argued that "[m]en become prudent and diligent by the consciousness that they will be made to suffer if they are not prudent and diligent."⁷³ But if the law bypasses the agent truly responsible, in search of what we today would call the "deep pocket," then the deterrent effect of punishment is negated. Law can never be content with the mere cataloging of antecedent events. A "levelling of all antecedents to the same parity" denies man's moral primacy and responsibility.⁷⁴ The law must be able to "distinguish . . . between physical and moral forces."⁷⁵ It remains the function of the court to determine what is, and what is not, the result of responsible causation. The fact-finder, usually the jury, must ultimately decide what the expert's report means.

Since a cause is not the sum of all antecedents, a jurist must discriminate between such antecedents as are produced by responsible volition and those that are not. Wharton maintained that anything that is not the result of the action of a free agent cannot be viewed as a cause. Action may be one of commission or one of omission. Negligence, or breach of positive duty, can be as culpable as any positive action. As Wharton wrote:

The law when any injury is done, betakes itself to consider whether there is any rational being who could if he had chosen, have prevented it, or who either seeing the evil consequences, or refusing to see them, has put in motion, either negligently or intentionally, a

71. Nicholas St. John Green, Book Review, 8 AM. L. REV. 508 (1874), *reprinted in* NICHOLAS ST. JOHN GREEN, *ESSAYS AND NOTES ON THE LAW OF TORT AND CRIME* 82 (1933).

72. Horwitz, *supra* note 64, at 203-04.

73. Horwitz, *supra* note 64, at 205 (quoting FRANCIS WHARTON, A SUGGESTION AS TO CAUSATION 11 (1874)).

74. *Id.*

75. *Id.* In an interesting aside, Wharton notes that the court may draw upon multiple experts but warns that their reports will not make the key distinctions which lead the court to decision.

series of mechanical forces by which the injury was produced.

This is the basis of the distinction between conditions and causes.⁷⁶

Without certain physical antecedents, a particular event could not occur. Yet, except insofar as these conditions are capable of being molded by human agency, the law does not concern itself with them. Whether the cause was proximate and remote is irrelevant if the act causing the injury was a voluntary one. Responsibility (imputation) ceases where accident (*casus fortuitus*, or simply *casus*) intervenes. If there is nothing to be imputed to the defendant, there is nothing with which he is chargeable. To the question of when imputation ceases and *casus* begins, the court must first decide if the danger could have been averted by the action of a diligent man. Whatever passes beyond the range of such diligence belongs to the *casus fortuitus*.⁷⁷ The loss must be immediately connected with the supposed cause of it.

A negligent person exercises no will at all. The moment he wills to do an injury or breaches a duty, he ceases to be negligent and becomes criminally liable. In the case of contributory negligence, the plaintiff, by intervening, breaks the causal connection between his injury and the defendant's negligence.⁷⁸ In discussing negligence, Wharton draws attention to two views. The first is that "a person is liable for all the consequences which flow in ordinary natural sequence from his negligence,"⁷⁹ that is, the normal view of accountability. The second is that a person "is liable for all the consequences that could be foreseen as likely to occur."⁸⁰

The second view opens a Pandora's box of philosophical questions. If we cannot predict the actions of others viewing them as individuals, can we predict the action of others taken as a class? Is behavior so governed by natural laws that certain actions, including negligence, can be accurately predicted? Wharton's answer is based on his understanding of human nature and its propensities. "To require us to act in such a way that no negligence on our part may be the conditions of negligence on the part of strangers, would require us to cease to be."⁸¹ If we do nothing, we are apt to omit something we ought to do. As Wharton explains:

If we do something, owing to the imperfection of all things human, there will be some taint, no matter how slight, of imperfection in the thing we do. Yet whether in doing or omitting, we touch more

76. FRANCIS WHARTON, A TREATISE ON LAW OF NEGLIGENCE § 85 (1874).

77. *Id.* § 120.

78. *Id.* §§ 134, 135.

79. *Id.* § 138.

80. *Id.*

81. *Id.*

or less closely multitudes of persons each with a free will of his own, each with idiosyncracies with which we have no acquaintance, each of whom may by some negligence cross our path and make action on our part, which is innocuous in itself, injurious.⁸²

The consequences of making a person liable for another's fault would lead to mischief. Wharton questions where such vicarious liability would end. "The consequence of this would be that the capitalist would be obliged to bear the burden, not merely of his own want of caution, but of the want of caution of [everybody else]."⁸³ Afraid that the law, if interpreted as Green affirmed, could be used to destroy the economic underpinnings of society, Wharton wrote, "'Here is a capitalist among these antecedents; he shall be forced to pay. The capitalist, therefore, becomes liable for all the disasters of which he is in any sense the condition, and the fact that he is thus held liable, multiplies these disasters.'"⁸⁴ If Green's view were to prevail, Wharton continues, "'No factory would be built. . . . Making the capitalist liable for everything, therefore, would end in making the capitalist, as well as the non-capitalist liable for nothing; for there would soon be no capitalist to be found to be sued.'"⁸⁵

Wharton saw that in divorcing responsibility from liability, capital is likely either to be destroyed or "compelled to shrink from entering into those large operations by which the trade of a nation is built up."⁸⁶ He could have had an instance like the Exxon Valdez prosecution or the Monsanto case in mind when he wrote, in 1875, that "[w]e are accustomed to look with apathy at the ruin of great corporations"⁸⁷ Convinced that no corporation could be ruined without grave social effects, Wharton argued for a limit to entrepreneurial liability. He rejected the "foreseeable test" doctrine because it could only be made on a statistical basis. From a statistical point of view, all risks are predictable in the aggregate. In a world of randomness where there is no necessary connection between particular causes and particular effects, all that can be done is to statistically correlate acts in the aggregate with aggregate consequences. Moral causation and free agency are replaced by probabilities and statistical correlations.

82. *Id.*

83. *Id.* § 139.

84. Horwitz, *supra* note 64, at 205 (quoting FRANCIS WHARTON, A SUGGESTION AS TO CAUSATION 11 (1874)).

85. Horwitz, *supra* note 64, at 205 (quoting FRANCIS WHARTON, A SUGGESTION AS TO CAUSATION 11 (1874)).

86. Francis Wharton, *Liability of Railroad Companies for Remote Fires*, 1 S.L. REV. 729, 730 (1875).

87. *Id.*

III.

Wharton's views remain as viable today as when they were first enunciated. Although his causal analysis of responsibility cannot be gainsaid, what he did not envisage was the widespread adoption of liability insurance based on probabilities and statistical correlations which he correctly thought could not say anything about the individual. Needless to say, Wharton's basic position is challenged by the tendency to look upon misfortune, whether inflicted by nature, by lack of self-discipline, or by accident, as somehow a social problem which ought to be rectified. If one begins with the principle that all loss should be compensated, the temptation is to search for a corporate or other affluent defendants to supply such compensation. This blame shifting blurs the causal chain or places all antecedents on an equal footing where there is no recognition of the distinction between occasion, condition or cause. When massive awards do occur, the community is ultimately forced to bear the burden as the damages assessed are passed on to the consumer by means of higher prices.

Wharton, and the legal tradition he represented, assumed certain general principles—namely that causes can be discerned, and when identified, responsibility assigned. Wharton assumed that accidents do occur where no one is at fault in any sense. An accident, by definition, is an unintended event, the intersection of independent causal chains. Wharton recognized that this lack of intention may or may not mitigate liability and would not abandon the prudent man test. Still, in any transaction there are at least two parties; intelligence must be assumed on all sides. Put another way, both buyers and sellers have reason to beware, lest hidden and unknown dangers become a reality.

Much has happened, both in law and in the marketplace, since Wharton's day. Whereas lack of caution or misuse of products in the 19th century would not have been allowed to serve as a basis for a claim, given shifts in legal theory, corporate leaders recognize that both judges and juries are likely to be swayed differently. By and large, the market has responded intelligently. Since most products, quite apart from misuse, are liable to failure or breakdown, any prudent manufacturer has to take the probability of failure into account. No enterprise, business or professional, whether engaged in manufacturing or in providing services, can afford to be without product liability or malpractice insurance. Drawing upon experience and probability statistics, liability insurance, in effect, mediates between the actual world of lived experience and the predictable world of aggregate risk. Wharton's concepts of human nature, causality and responsibility are not incompatible with the insured's assumption of inevitable failure. No doubt

he would accept that, but he would not allow into the courtroom mere logical possibility to be used with hindsight. The “prudent man acting with all available foresight” is a principle he would undoubtedly seek to preserve. Wharton would understand, but lament, the growing need for ever increasing amounts of liability insurance, recognizing that insurance, no less than a jury award, shifts the financial burden to the public, albeit indirectly. He would adamantly resist the employment of judge-made law, or even legislation, to redress natural inequities or to disavow fault.

If Wharton represents one side, the Critical Legal Studies faction represents the other in a debate that promises to be an ongoing one in legal circles. The fundamental debate is, of course, between two anthropologies: a classical view of human nature represented by Aristotle in antiquity, and a socialist one represented by Marx in the 19th century. Philosophies do, in fact, matter; they determine how we think about law and the ends of law, that is, the role of law in society.